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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1096

PIERCE OIL CORPORATION AND HENRY C. RIELY AND ROBERT T. BARTON, JR., AS ITS RECEIVERS, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 36–44) is reported in 55 F. Supp. 731.

JURISDICTION

The judgment of the Court of Claims was entered on January 8, 1945 (R. 44). The petition for a writ of certiorari was filed on April 2, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether petitioners paid any "interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes" computed in excess of the rate of six per cent per annum, within the meaning of Section 821 of the Revenue Act of 1938, so as to be entitled to recover the excess over six per cent per annum as therein provided.

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 821. INTEREST ACCRUING AFTER OCTOBER 24, 1933, AND BEFORE AUGUST 30, 1935, ON DELINQUENT INCOME, ESTATE, AND GIFT TAXES.
>
> Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund.

Revised Statutes:

> SEC. 3229. The Commissioner of Internal Revenue, with the advice and consent of

the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal-revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommendation of the Attorney-General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise.

STATEMENT

The special findings of fact of the Court of Claims (R. 19–36) may be summarized as follows:

Pierce Oil Corporation, hereinafter referred to as the taxpayer, was a Virginia corporation dissolved in 1940. Henry C. Riely and Robert T. Barton, Jr., are its receivers, appointed with authority to prosecute this suit. (R. 19.)

The taxpayer filed federal income and profits tax returns for the calendar years 1918, 1919, and 1920. After the Commissioner of Internal

Revenue proposed deficiencies thereon, petitions were filed with the United States Board of Tax Appeals. While the petitions were pending, the Commissioner made a jeopardy assessment of deficiencies and deficiency interest. Jeopardy notices and demands for payment thereof issued on January 13, 1933, in an aggregate amount of $3,607,981.58 for the three calendar years. (R. 20.) At that time the Board had not decided the issues before it (R. 21).

The Board's opinion was promulgated on April 17, 1935 (*Pierce Oil Corp.* v. *Commissioner,* 32 B. T. A. 403), and the Board held, among other things, that the taxpayer was entitled to special assessment; that recomputation of its income should be made in accordance with the opinion; that proper comparatives should be applied to the redetermined net income in order to determine its profits tax; and that, if necessary, the proceeding would be assigned for further hearing before the entry of judgment (R. 22).

On November 29, 1935, the parties agreed upon the special assessment rates. At or about that time, the Commissioner submitted to the taxpayer a recomputation of its liability under the opinion of the Board, showing a deficiency in tax without interest aggregating $2,042,187.67 for the years 1918 to 1920, inclusive. The Commissioner's recomputation and the stipulation as to special assessment rates were filed with the Board on December 3, 1935. (R. 22–23.)

On Febuary 18, 1936, the taxpayer submitted a written offer to pay $2,035,721.77 in complete settlement and satisfaction of the consolidated tax liabilities of itself and two other affiliated corporations, including all interest upon any deficiencies (R. 23).

On March 31, 1936, the taxpayer submitted a revised offer of settlement which differed from its prior offer in that it offered to pay a further sum of $27,819.20 in settlement of an outstanding assessment for additional interest and penalty upon its original tax for the year 1920 (R. 24). The formal offer of $27,819.20 in compromise contained the following statement (R. 26):

> Payment will be made upon notification of acceptance of this offer and of acceptance of offer in settlement of deficiencies and interest thereon for 1918, 1919, 1920, evidenced by letter of counsel for Pierce Oil Corporation, addressed to Commissioner of Internal Revenue under date of March 31, 1936.

In connection with the two offers in settlement and compromise, the taxpayer urged that any attempt to liquidate at that time could not under normal conditions result in obtaining a net amount for its assets of more than $1,250,000; that unassisted it could not raise enough money to pay its liability under the Board's decision; and that acceptance of the offer in compromise and the offer in settlement was suggested with a

view toward disposing of all of taxpayer's pending tax liabilities (R. 26).

Since the offer of $2,035,721.77 in settlement and satisfaction of the deficiencies and interest in regard thereto for 1918, 1919, and 1920, was in a lump-sum amount without separation as between tax deficiencies and interest, and since the Board before which the cases were then pending had jurisdiction to determine deficiencies in tax but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiencies, the Bureau of Internal Revenue, with the approval of the Commissioner, made a computation (see R. 28) designed to show what deficiencies in payment in respect of the tax plus interest at six per cent and at twelve per cent for certain periods would actually produce the total sum of $2,035,721.77 (R. 27). The taxpayer had no knowledge of the details of this computation until November 28, 1936 (R. 29), and there is no evidence that either the taxpayer or the Government considered that any definite portion of the lump-sum offer agreed upon specifically represented interest as such (R. 32). The computation was based on the deficiencies recomputed pursuant to the opinion of the Board and a reduction of the 1918 deficiency so that the total for all years would equal taxpayer's lump-sum offer of $2,035,721.77; it was made on the understanding that payment of such amount would be made by the taxpayer on April 30, 1936 (R. 27).

Both the offer of $27,819.20 in respect of the interest and penalty on the original assessment for 1920, and the offer of $2,035,721.77 with respect to the taxpayer's liability in connection with additional taxes and interest thereon for 1918 to 1920, inclusive, were considered by the Commissioner together and at the same time, and were accepted by him on the conditions outlined in the taxpayer's offers. These offers were approved by the Acting Secretary of the Treasury on April 27, 1936, under the authority of Section 3229 of the Revised Statutes. (R. 29.) Thereafter, on April 28, 1936, a written agreement was signed by counsel for the taxpayer, the Commissioner, and the General Counsel of the Treasury Department which included provisions as to the steps to be taken in carrying out the settlement (R. 29–30).

On April 30, 1936, the taxpayer delivered to the Collector two certified checks in the amounts of $2,035,721.77 and $27,819.20, and the Board entered deficiencies and abatements for the years 1918, 1919, and 1920. (R. 30–31.) Certificates of overassessment showing a correct tax liability and abatements for the years 1918, 1919, and 1920 in the amounts agreed upon as aforesaid were subsequently issued. Upon receipt thereof and of a schedule of overassessments by the Collector, appropriate entries were made upon his records on June 30, 1936, showing the total amount of $2,035,721.77 credited in payment of deficiency tax, deficiency interest, and delinquent interest as follows (R. 35):

Year	Deficiency tax	Deficiency interest	Delinquent interest	Total
1918	$450,314.84	$185,813.47	$226,200.25	$862,328.56
1919	517,637.97	213,593.02	260,017.71	991,248.70
1920	95,117.32	39,248.27	47,778.92	182,144.51
	1,063,070.13	438,654.76	533,996.88	2,035,721.77

The deficiency taxes shown above included both income and profits taxes but it cannot be determined from the record what portion represented income tax and what portion represented profits tax (R. 36).

If the Interest Computation Section of the Bureau of Internal Revenue had used an interest rate of six per cent from February 26, 1926, to April 30, 1936, without computing additional interest at twelve per cent from January 13, 1933, to August 30, 1935, as was actually done (see tabulation R. 28), the amount representing the difference between twelve per cent and six per cent interest would, in the distribution of the lump-sum offer of the taxpayer, have been reflected by the computation in the amount set forth therein as tax or deficiency in payment for 1918. In other words, the amount of $450,314.84 shown in the computation as tax, or deficiency in payment of tax for 1918, would have been increased in the amount of such difference in the interest computation, and the taxpayer would have paid the same total amount, i. e., $2,035,721.77 (R. 33–34).

If the amount shown as delinquent interest on the Collector's records had been computed at six per cent instead of twelve per cent for the period

October 25, 1933, to August 29, 1935, both inclusive, the amounts of such interest shown for each of the years 1918, 1919, and 1920 would have been reduced by the respective amounts of $70,601.53, $81,156.61, and $14,912.73, a total of $166,670.87 (R. 36).

On November 12, 1938, the taxpayer filed claims for refund which were rejected by the Commissioner of Internal Revenue on May 31, 1939 (R. 36). On the taxpayer's petition for refund, the Court of Claims denied recovery (R. 44).

ARGUMENT

1. Section 821 of the Revenue Act of 1938, *supra*, p. 2, upon which petitioners rely, applies only in cases where interest in excess of six per cent has been collected. The Court of Claims was unable to find that such interest was, in fact, collected. Petitioners' statement of the question presented and their argument ignore this controlling factor.

The court below found (R. 27) that the taxpayer's offer to pay $2,035,721.77, in settlement and satisfaction of certain deficiencies and interest in respect thereto for the years 1918, 1919, and 1920, was in a lump-sum amount without separation as between deficiencies and interest; that (R. 29) such offer, coupled with another not material here, was accepted by the Commissioner of Internal Revenue and approved by the Acting Secretary of the Treasury under authority of

Section 3229 of the Revised Statutes; and that (R. 30) the agreed lump sum was paid on April 30, 1936.

While the Government's claim included interest, it was compromised for a lump-sum which was less than the amount of taxes without interest (R. 23), it being urged that the taxpayer, unassisted, could not meet its liability under the outstanding decision of the Board of Tax Appeals (R. 26). The formal approval of the compromise was on April 27, 1936 (R. 29).

The court below also found (R. 27) that the Board had jurisdiction to determine deficiencies in tax but did not have jurisdiction to make a determination with respect to interest due or to become due on deficiences; that deficiencies in tax only were computed in amounts which the Board might enter; that such deficiencies, with interest at six per cent and twelve per cent for certain periods would exactly produce the sum of $2,035,721.77; and (R. 33) that the taxpayer would have paid that sum even if interest had been computed only at six per cent, since the difference would have been reflected as tax or deficiency in payment for 1918.

Since the settlement involved cases pending in the Board of Tax Appeals, it was necessary to clear the Board's docket. It was also necessary to clear the records of the Collector. A computation was therefore made distributing the amount of the compromise offer between taxes and in-

terest. The taxpayer had no knowledge of the details of this computation until November 28, 1936 (R. 29), and there is no evidence that either the taxpayer or the Government considered that any definite portion of the lump-sum offer agreed upon specifically represented interest as such (R. 32). The computation referred to was incorporated in a signed agreement of April 28, 1936 (R. 29), and petitioners' contention that the taxpayer paid interest is predicated upon this agreement and an opinion of the Attorney General (38 Op. A. G. 94) said to bar compromise of the liability for twelve per cent interest.

The agreement was signed on behalf of the Government by the Commissioner of Internal Revenue and the General Counsel of the Treasury. The statutory representatives of the Government in compromise matters are the Commissioner and the Secretary of the Treasury. R. S. Sec. 3229, *supra*, pp. 2–3. The Commissioner and the Secretary had already approved the lump-sum compromise the day before the agreement of April 28, 1936, and the latter was a mere matter of administrative detail.

The opinion of the Attorney General in no way aids petitioners. As the court below made clear (R. 39), that opinion, as clarified (38 Op. A. G. 98), did not bar the compromise of the twelve per cent interest requirement.

The Court of Claims was clearly correct in holding that the compromise did not contemplate pay-

ment of specific sums for taxes for specific years, and specific sums for interest at certain rates for certain periods (R. 40–41). The inapplicability of Section 821 to the facts of this case is therefore apparent.

2. Section 821 deals exclusively with interest paid "on delinquent income, estate, and gift taxes." The deficiency taxes in question here included both income taxes, which are dealt with in Section 821, and profits taxes, which are not dealt with in Section 821 (R. 52). Since no allocation has been made as between the portion of the compromise representing income taxes and the portion representing profits taxes, it is apparent that no proper basis has been supplied for the application of Section 821 even if excessive interest was paid.

3. Petitioners assert a conflict (Pet. 11) with *Staten Island Hygeia Ice & Cold S. Co.* v. *United States,* 85 F. 2d 68 (C. C. A. 2d), and *Cloister Printing Corp.* v. *United States,* 100 F. 2d 355 (C. C. A. 2d). Those cases expressly distinguished an earlier decision of the Court of Claims in *Hord* v. *United States,* 59 F. 2d 125, and the distinctions are equally applicable here.[1] Moreover, the asserted conflict relates only to an alter-

[1] *Big Diamond Mills Co.* v. *United States,* 51 F. 2d 721 (C. C. A. 8th), and *Colorado Milling & Elevator Co.* v. *Howbert,* 57 F. 2d 769 (C. C. A. 10th), referred to by petitioners (Pet. 9), turned on the terms of the compromise agreements there involved.

native ground of the decision below, for the court's inability to find a payment of interest in excess of six per cent is sufficient to support its judgment.

CONCLUSION

No question of general importance is presented and there is no conflict. The decision of the court below is correct and the petition should be denied.

Respectfully submitted.

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